In the High Court of Judicature at Madras

Dated :: 27.09.2006

Coram

The Honourable Mr. Justice A.C.ARUMUGA PERUMAL ADITYAN

Appeal Suit No.685 of 1992

1. Jayarama Reddiar (died)
2. J.Girija
3. Hemambujam
4. J.Devanathan

Appellants 2 to 4 are brought on record as Lrs of the deceased sole appellant as per order of Court dated 15.4.04 made in CMP.No.18176/03. ... Appellants

v

Chitra Ammal
rep. by her Agent
Muthu Varatha Reddiar ... Respondent

Appeal suit filed under Section 96 of Code of Civil Procedure against the decree and judgment dated 16.07.1991 and made in O.S.No.292 of 1987 on the file of the learned Subordinate Judge, Cuddalore.

For appellants : Mrs.Chitra Sampath
For respondent : Mr.V.Kunchithapatham

JUDGMENT

This appeal has been filed by the first defendant against the decree and judgment in O.S.No.292 of 1987 on the file of the Subordinate Judge, Cuddalore.

2. The suit is for specific performance of contract entered into between the plaintiff and the defendants 1 and 2 in the suit on 09.03.1987. Defendants 1 and 2 have agreed to sell the plaint schedule property for Rs.1,70,000/- and on the same day, the plaintiff has paid Rs.1,00,000/-. It was agreed upon between the parties that the plaintiff has to pay the balance of sale consideration of Rs.70,000/- within nine months and to get the sale deed executed. There is also a clause incorporated in the sale agreement to the effect that in case, if the father of the first defendant, namely the second defendant, failed to join for registration of the sale deed, a proportionate deduction has to be made in respect of Survey No.429 measuring 1acres 50 cents from the total

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sale consideration as agreed to between the parties under the sale agreement dated 09.03.1987 and the value of the land was fixed at Rs.240/- per cent and the accessories were valued at Rs.8000/-. The plaintiff was ready with the balance of sale consideration in the second week of November, 1987 and wrote a letter to the first defendant informing him that he is ready to get the sale deed executed after paying the balance of sale consideration. But the first defendant purposely delayed the execution of the sale deed. The first defendant had borrowed a hand loan of Rs.5000/- from the plaintiff and he had agreed to adjust the said amount in the sale consideration at the time of execution of the sale deed. As per the terms of the agreement of sale, the plaintiff issued notice dated 24.11.1987 to the first defendant asking him to receive Rs.70,000/- towards the balance of sale consideration and requested him to execute the sale deed, in the alternative, the plaintiff suggested the first defendant to receive Rs.34,000/- and to execute the sale deed. After the receipt of the notice, the first defendant had sent a reply notice containing false allegations. Again on 05.12.1987 the plaintiff issued another notice to the first defendant calling upon him to come to the Sub Registrar's Office on 08.12.1987 along with his father, the second defendant to execute the sale deed. But the defendants have not executed the sale deed. The defendants have not discharged the previous loans. Hence, the suit.

3. The second defendant has adopted the written statement filed by the first defendant, which runs as follows:

The first defendant along with his father, the second defendant executed a sale agreement in respect of the plaint schedule property on 09.03.1987 for a sale consideration of Rs.1,70,000/-. The time stipulated for executing the sale deed was nine months. There were subsisting encumbrance over the property at the time of sale agreement. The first defendant had discharged the Co-operative Agricultural Bank loan, Melarungunam village, a mortgage loan and the amount borrowed under promissory note. Only on the verge of the last date of the limitation prescribed under the sale agreement, the plaintiff had sent a notice dated 24.11.1987 to the first defendant and in the said notice the plaintiff had stated that the first defendant had failed to discharge the previous loans. In the reply notice, the first defendant had stated in clear terms that the previous loans have been discharged and he would execute the saledeed within three months thereafter. The defendants had also undertook to hand over the documents to the plaintiff, relating to the discharge of the loans by them. The plaintiff has not performed his part of contract as per the terms of the agreement. On the other hand the plaintiff had sent a notice on 05.12.1987 requiring the defendants to be present at the Sub Registrar's Office on 08.12.1987 for the execution of the sale deed . When the defendants contacted the Sub Registrar's Office, they required them to produce the Income-tax Clearance Certificate within 15 days. The first defendant was waiting at the Sub Registrar's office on 08.12.1987 between 9.00 am and 6.00 p.m., along

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with Tvl. A.Ramasamy, Thirugnanam, M.Ramasamy Padayachi. But the plaintiff never turned up. To wriggle out of the situation, the plaintiff had issued a telegram requesting the defendants to be present at the Sub Registrar's Office on 10.12.1987 and in the telegram itself, the plaintiff has stated that if the defendants fail to appear before the Sub Registrar on 10.12.1987, the agreement will be cancelled. The defendants have never borrowed any hand loan of Rs.5000/- from the plaintiff. In order to gain time, the plaintiff has filed this vexatious suit. Since the time stipulated under the agreement of sale has already been expired, the plaintiff has no locus standi to file the suit for specific performance of contract and prays for dismissal of the suit.

4. On the above pleadings, the learned trial Judge had framed two issues and on the basis of the documentary and oral evidence, has come to a conclusion that the plaintiff is entitled to a decree for specific performance of contract, giving a month's time to the defendants to execute the sale deed. Aggrieved by the findings of the learned trial Judge, the first defendant has preferred this appeal.

5. The points for determination in this appeal are:

1) Whether the plaintiff has performed her part of contract as per the terms of Ex.A1 sale agreement dated 09.03.1987?

2) Whether the parties agreed to perform their part of contract before the stipulated time?

6. Point No.1:- Ex.A.1 is the sale agreement dated 09.03.1987 entered into between the plaintiff and defendants 1 and 2. The first defendant is the son of the second defendant. The sale agreement was signed by the plaintiff as well as the first defendant. As per the agreement of sale, a sum of Rs.60,000/- was paid by the plaintiff to the first defendant on the date of execution of Ex.A.1 sale agreement and another sum of Rs.40,000/- was paid as per Ex.A.2 endorsement and the balance of sale consideration is Rs.70,000/-. A clause is also provided under Ex.A.1 sale agreement that in case, if the second defendant fails to join with the first defendant to execute the sale deed in respect of the suit property, item 8 of the schedule mentioned property, namely 1acre 50 cents in Re-survey No.429 is to be deleted and the proportionate sale price ofRs.240/-per cent is to be deducted from the balance of sale consideration.

7. The learned trial Judge has decreed the suit as prayed for by the plaintiff by thus granting a decree for specific performance on the ground that the defendants have failed to perform their part of contract. At paragraphs 12 and 13 to the judgment, the trial Court has observed that the previous loans raised by the defendants in various banks and the

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previous hand loan from the plaintiff under promissory notes were not discharged as admitted by the defendants before the time stipulated therein. The time stipulated under Ex.A1 for the defendants to discharge the previous loans is nine months from the date of execution of the sale agreement. The sale agreement is dated 09.03.1987. So the defendants have to discharge the previous loans which were subsisting in respect of the suit property on or before09.12.1987. In Ex.A.1 itself, the previous subsisting loans to be discharged by the defendants have been mentioned.

They are:

1. Loan No.1627 - Cuddalore Agricultural Co-operative Bank in
2. Loan No.345 - Agricultural Co-operative Bank, Melarungunam
3. Mortgage loan borrowed from one Krishnaveni wife of Verrappa Padayachi
4. Mortgage loan borrowed from one Anjalachi Ammal wife of Rajendran
5. Mortgage loan of Subbarayalu Reddiar and
6. Loans borrowed under promissory notes.

Even though the trial Court has observed in the judgment at paragraphs 12 and 13 that the defendants have not produced any document to show that they have discharged the above said loans, the documents produced on the side of the defendants in the suit will go to show that the observations of the trial Court is a factual mistake. Ex.B.19 is the Pass book issued and maintained by the Agricultural Co-operative Bank to show that Loan No.345 was discharged by the defendants as early as on 28.02.1987 itself, that is before the execution of the sale agreement Ex.A.1. Ex.B.3 is the receipt issued to the first defendant for having discharged the loan No.345 of the Agricultural Co-operative Bank, Melarungunam village. Ex.B.5 is the discharge endorsement in Ex.B.4 mortgage executed in respect of the schedule mentioned property in favour of one Krishnaveni Ammal dated 12.10.1983. The discharge entry under Ex.B.5 is dated 18.03.1987, that is subsequent to Ex.A.1 sale agreement. Ex.B.7 is the discharge endorsement dated 23.07.1987 for the mortgage debt Ex.B.6, in respect of the mortgage loan borrowed from one Anjalachi Ammal. Ex.B.9 is the discharge entry dated 07.07.1987 for the mortgage loan borrowed from one Subburayalu Reddiar under Ex.B.8 mortgage deed. Exs.B.13 to B.18 are the discharge of the promissory notes.

8. Learned trial Judge has rejected Exs.B.13 to B.18 on the ground that there is no discharge entry made in those promissory notes. But the trial Judge has failed to take into consideration the defacement of the revenue stamps affixed to the said promissory notes thereby discharging the loans therein.

9. Even though the defendants have not produced any document to show that they have discharged the loan No.1627, borrowed from the Agricultural Co-operative Bank, that will not in any way derive us to come to a conclusion that the plaintiff has performed her part of contract. Ex.A.3 is the notice issued by the plaintiff to the defendants asking them

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to execute the sale deed on or before 08.12.1987. Ex.A.4 is the reply notice by the defendants to the plaintiff dated 26.11.1987 for Ex.A.3 notice. Even in the reply notice the defendants, in a crystal clear terms, have mentioned that the plaintiff must be ready to pay the balance of sale consideration and get the sale deed executed on or before 08.12.1987. Under Ex.A.5 dated 05.12.1987, the plaintiff has requested the defendants to be present at Pudupet Sub Registrar's Office on 08.12.1987 between 10.00 am and 5.00 p.m. with all the discharged encumbrance to register the sale deed. It is the case of the plaintiff that he was present at the Sub Registrar's Office on 08.12.1987 with the balance of sale consideration but the defendants alone failed to turn up. Ex.B.11 is the telegram issued by the first defendant informing the plaintiff that he had waited at Pudupet Sub Registrar's Office on 08.12.1987 from 9.00 am to 5.00 p.m but the plaintiff has failed to turn up. In Ex.B.11 itself, the first defendant has fixed another date that is 10.12.1987 for registration before the same Sub Registrar. Even on 10.12.1987, the plaintiff did not turn up. Hence, the first defendant issued another telegram Ex.B.12 to the plaintiff stating that the plaintiff has not turned up for registration on 10.12.1987 also. Even under Ex.B.11 the first defendant has stated that the Document Writer Rajagopal was also present on 08.12.1987 to write the recitals in the sale deed. D.W.3 Rajagopal also corroborated the evidence of D.W.1 to the effect that he was along with the defendants at Sub Registrar's Office on 08.12.1987 but the plaintiffs did not turn up. Further the evidence of P.W.1 and P.W.2 are also contrary to each other. P.W.1 in his evidence has stated in the cross examination that on 08.12.1987 he was waiting at the Sub Registrar's office but he did not know whether the Document Writer Rajagopal was present at that time or not. Per contra, P.w.2 would depose in his cross examination that the Document Writer Rajagopal was present before the Sub Registrar's office from 9.00 a.m to 4.30 p.m. It has been proved by D.W.3 Rajagopal that the first defendant was present on 08.12.1987 at the Sub Registrar's office but the plaintiff alone had failed to appear. There is absolutely no documentary evidence produced, like Pass Book or any Fixed Deposit Receipt, by the plaintiff to show that she had sufficient funds on 08.12.1987 to the tune of Rs.70,000/- to pay the balance of sale consideration to get the sale deed executed from the defendants.

10. Learned counsel for the appellants relaying on the decision reported in 1997 (I)CTC 360 (Seeni Ammal v. Veerayee Ammal) and contended that under Section 16 of the specific Reliefs Act, in a suit for specific performance agreement of sale, if parties to the suit specifically agreeing to complete contract within stipulated date, then the time is the essence of contract and the General principle that time is not essence of contract relating to immovable property, is not applicable. The fact of the above dictum is that the defendant in that suit was the owner of wet land to an extent of 27 cents and agreed to sell the same to the plaintiff for a price of Rs.24,300/-and that the sale agreement was reduced to writing and signed by the contracting parties. The said agreement was

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executed on 05.10.1079 and on that day, Rs.8000/- was paid as advance, and the time stipulated to execute the sale deed was three months and again it was extended upto 15.06.1980. Since the defendant even after two letters written by the plaintiff was not prepared to execute the sale deed on receipt of balance of sale price, the plaintiff filed the suit. The relevant observation in the above said dictum is as follows:

> "Another important fact is that the plaintiff as P.W.1 deposed in the following manner:
>
> "என்னிடம் பணம் இல்லை. என் கணவனிடம் பணம் உள்ளது. வங்கியில் போட்டு இருக்கிறார். எனக்கு ஐந்து பெண்கள் யாவரும் மணமானவர்கள். ஏ.1 க்குப் பின் என் மகளுக்கு திருமணம் நடந்தது. என் கணவர் பணம் தந்து நான் கட்டுவதாக இருந்தது. எந்த வங்கி என்று தெரியாது"
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> A reading of the above deposition shows that the plaintiff, who is a party toEx.A.1 sale agreement, has admitted that she has not possessed of any money. She has also admitted that her husband will advance money for completion of the sale transaction. Even though her husband was available, he was not examined to speak about the availability of money and resources for completion of the contract. In such circumstances, the learned counsel for the appllellant relied on a Division Bench Judgment of this Court reported in Sonnappa Iyer v. K.R.Ramuthiammal and others, 1994 (1) N.L.J.44.
>
> In the said decision it has been held that non-production of best evidence is fatal to the plaintiff's case. In the said decision, the Division Bench has held as follows:
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> "When the burden is on the plaintiff to prove clearly in order to get the equitable relief of specific performance, he ought to have produced the best evidence available with him and his failure to do so would enjoin the court to draw an adverse inference against him."
>
> The said proposition is squarely applicable to this case for the simple reason that the plaintiff having deposed that she was depending on her husband for completion of the sale transaction and in the absence of any money with her she ought to have examined her husband in support of her case. Non-examination of the husband of the plaintiff is a fatal to the plaintiff's case as observed by the Division Bench in the above case".

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11. In the case on hand, the plaintiff has not chosen to enter into the box to prove her case. The plaintiff's father-in-law was examined as P.W.1and he would depose that he is the power agent of the plaintiff. But the Power of Attorney deed was not produced in the suit to substantiate his contention. P.W.1 would further admit that he had not purchased any stamp papers for preparing the sale deed. He would depose that by selling a property belonging to one Kamala Bai at Uraiyur, he had raised the price amount. But it is not known who the said Kamala Bai was and in what way she is related to the plaintiff and whether any sale deed was executed in respect of her property and whether she gave the said amount to the plaintiff are all in complete darkness. There is no explanation forth coming for the non-examination of the plaintiff in the suit. There is no document produced on the side of the plaintiff to show that the plaintiff was having sufficient source of money to get the sale deed executed in her favour. Hence, I hold on point No.1 that the plaintiff has not proved that she was ready and willing to perform her part of the contract.

12. Point No.2:- The time stipulated for executing the sale deed under Ex.A.1 was till 09.12.1987. But till 08.12.1987, the plaintiff has not sent any notice to the defendants as to show that she is ready and willing to perform her part of contract. Under Ex.A3 notice, the plaintiff has asked the defendants to come to the Sub Registrar's Office on 08.12.1987 to execute the sale deed. But to the dismay he has not turned up to the Sub Registrar's office for executing the sale deed, is seen from Ex.B.11 telegram given by the first defendant to the plaintiff.

13. Learned counsel appearing for the appellant relied on a decision reported in 1997 (II) CTC 158 (His Holiness Acharya Swami Ganesh Dassji v Shri Sita Ram Thapar) and it has been held by the Hon'ble Apex Court of India as follows:

> " There is distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, ie., by 27.2.1975.

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> The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willing to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bite for the time which disentitles him as time is the essence of contract."

14. The above dictum would squarely apply to the fact of the present fact of the case on hands. Here also, the plaintiff has miserably failed to prove that she was ready and willing to perform her part of contract with sufficient funds and also to get the sale deed executed within the time stipulated under Ex.A.1 sale agreement. Hence, I hold on Point No.2 that the plaintiff has failed to perform her part of contract within the stipulated time,

15. In fine, the appeal is allowed and the decree and judgment dated 16.07.1991 and made in O.S.No.292 of 1987 on the file of the Subordinate Judge, Cuddalore is hereby set aside and the suit is dismissed. The plaintiff has to pay the Court fee due to the Government.

kvsg

Sd/-
Asst. Registrar

//true copy//

Sub Asst.Registrar

To

1. The Subordinate Judge, Cuddalore
2. The Record Keeper, VR Section, High Court, Madrs.104.

+ one cc to M/S.Chitra Sampath, Advocate Sr.No.45597.

LA (CO)
RSM/17.10.2006

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